

Hon. Barbara J. Rothstein

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

ACCESS TO ADVANCED HEALTH
INSTITUTE,

Plaintiff,

vs.

PATRICK SOON-SHIONG, M.D. and CHAN
SOON-SHIONG FAMILY FOUNDATION,

Defendants.

Case No. 2:24-CV-01253-BJR

**DEFENDANTS' OPPOSITION TO
PLAINTIFF'S EMERGENCY
MOTION FOR TEMPORARY
RESTRAINING ORDER**

ORAL ARGUMENT REQUESTED

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1 **I. INTRODUCTION**

2 While proclaiming that they wish to preserve the “status quo,” three individuals at Plaintiff
 3 Access to Advanced Health Institute (“AAHI”) – CEO and Board member Dr. Corey Casper,
 4 General Counsel Candice Decaire, and one outside director (Dr. Edward Mocarski) (collectively,
 5 “Management”) – are clumsily attempting a corporate coup. Part of their agenda is to halt a Board
 6 investigation of AAHI’s misuse of grant funds. The individuals, via counsel they retained to
 7 purport to act for AAHI without Board approval, ask this Court for seven extraordinary remedies
 8 based on false claims of “emergency” and in clear violation of AAHI’s governance documents and
 9 contractual commitments. They ask the Court to:

10 (1) require Board Chairman and major donor Dr. Soon-Shiong to recuse himself from
 11 major Board decisions on broad subject matters;

12 (2) endorse their improper effort to install two new directors affiliated with Management
 13 onto the Board, contrary to the Bylaws and without a valid Board vote;

14 (3) nullify any Board actions taken after this unauthorized lawsuit was commenced;

15 (4) nullify certain Board actions taken *before* this lawsuit was commenced, including
 16 (tellingly) the independent investigation the Board commenced into Management’s misconduct;

17 (5) order that the Board may act as to certain issues only with at least seven directors;

18 (6) prohibit AAHI from sending monies to hospital organizations in South Africa, as it was
 19 duly authorized by the Board to, and as it committed to its donor to do; and

20 (7) appoint a “corporate monitor” without any legitimate basis for that relief – to oversee,
 21 among other things, expansion of the Board, in an effort to circumvent the Bylaw and Governance
 22 Committee requirements that such expansion is permitted only by a majority Board vote.

23 None of this relief is permissible, particularly on an “emergency” TRO application. There
 24 is no emergency, let alone one that would require the Court to interfere with AAHI governance,
 25 and advance Management’s agenda, in the impermissible ways set forth above. There is no reason
 26 or precedent for the Court to grant the extraordinary relief these three individuals seek, or to
 27 facilitate the attempted Management coup and attempt to avoid an independent investigation of
 28 Management’s own misdeeds and misuse of grant funds.

1 What is really going on is this: Dr. Soon-Shiong, through the Chan Soon-Shiong Family
2 Foundation (“Foundation”), made a \$26 million grant to AAHI. That grant enabled AAHI to
3 recover from insolvency and exit receivership. The Foundation made the grant with the
4 understanding that AAHI and its CEO had a true commitment to help underserved populations
5 suffering from diseases in Africa. The \$26 million was primarily intended (and AAHI promised
6 to use it) to fund certain medical initiatives in Africa, a goal that Dr. Casper professed to share
7 with Dr. Soon-Shiong. When the time came for the Board to approve funding those initiatives, a
8 majority of the Board approved the funding, but Dr. Casper (who, per his employment agreement,
9 is not supposed have a vote) and Dr. Mocarski objected. When the Board committed, as promised,
10 to spend \$3 million per year over three years to support educating and training doctors and nurses
11 in South Africa, Dr. Casper was displeased; he apparently preferred retaining funds to safeguard
12 his lucrative compensation, rather than using the grant for its intended purpose.

13 Dr. Casper and Ms. Decaire then tried to orchestrate support for Dr. Casper’s rejected
14 views. They sought to expand the number of directors from seven to eleven and install new
15 “independent” directors – at least one clearly not “independent” at all, but affiliated with Dr.
16 Mocarski – to support Management’s position. They put the Board expansion effort up for a vote
17 without Dr. Soon-Shiong present, representing to the then-present directors that the vote was to
18 determine only whether the Board would interview potential candidates. They now claim the vote
19 actually allowed a Governance Committee to appoint and install candidates no one on the Board
20 had even met (other than Dr. Mocarski), in violation of the Bylaws and Governance Committee
21 charter. Among other things, the Board never conducted the voting the Bylaws require to expand
22 the number of directors by two or to install the two “new” directors. There are no Board meeting
23 minutes or other contemporaneous writings showing that any new directors were duly approved
24 by the Board, and AAHI’s papers cannot point to any. In fact, last week, on August 13, 2024, the
25 Board passed a resolution clarifying that no new directors had actually been appointed.

26 The day after Management’s effort to pack the Board was rejected by Board resolution,
27 Management ran to this Court via counsel it had retained proclaiming an “emergency.” Counsel
28 purportedly representing AAHI here was retained by Management covertly and without Board

1 authority – and in defiance of contemporaneous Board discussions directing that these issues be
 2 resolved amicably. Management now is using this outside counsel, apparently being compensated
 3 on contingency basis impermissibly compromising future Foundation funds, to ask this Court to
 4 advance their agenda and to grant extraordinary and impermissibly meddlesome relief.

5 For all of these reasons – unauthorized retention of counsel, using future grant funds for
 6 compensation, disregard of Bylaws and Governance Committee charter, Board directives, and
 7 contractual commitments, and extreme overreaching with no true emergency – the TRO
 8 application should be denied. The requested relief involves matters of corporate governance
 9 inappropriate for resolution on a TRO, particularly where there is no actual “emergency,” apart
 10 from Management’s desire not to be investigated and to undo Board votes they do not like. For
 11 these, and other reasons discussed below, the Court should deny the TRO request in its entirety.

12 **II. BACKGROUND**

13 **A. Dr. Casper’s History and Misuse of Funds, Leading to IDRI’s Receivership**

14 Although AAHI’s papers suggest that prior management was to blame for AAHI’s past
 15 struggles and receivership, *see* Complaint ¶ 8, Dr. Casper, the mastermind of the current attempted
 16 coup, *was* prior management. Dr. Casper was the Chief Medical Officer, Chief Scientific Officer,
 17 and CEO of AAHI’s predecessor (IDRI) in the five years before its emergence from receivership,
 18 and successfully ousted IDRI’s founder Steve Reed in 2019. *See* Soon-Shiong Decl. Exs. 11, 12.

19 At the time Dr. Casper took over IDRI, the company had been working on vaccines for
 20 leprosy and TB, having secured, among others, a research grant of up to \$45 million from the
 21 National Institutes of Health. *Id.* In a move that, according to the NY Times, “baffled many,” Dr.
 22 Casper laid off one third of its employees the day before Thanksgiving, “shutter[ing]” its TB and
 23 leprosy programs. *Id.* At the same time, Dr. Casper staunchly defended his own salary increase,
 24 while terminating Dr. Reed who had invented ID93, the TB vaccine. *Id.* IDRI entered receivership
 25 under Dr. Casper’s leadership by 2020. Decaire Decl. ¶ 6.

26 **B. AAHI’s Exit from Receivership and Receipt of the Grant from the Chan Soon- 27 Shiong Family Foundation to Pursue Projects in Africa**

28 When Dr. Soon-Shiong and the Foundation first became involved with AAHI (then IDRI)

1 in 2021, AAHI was in receivership. Soon-Shiong Decl. ¶ 2. AAHI's CEO Dr. Casper and General
 2 Counsel Ms. Decaire approached Dr. Soon-Shiong and his family Foundation asking that they
 3 contribute funds to rescue AAHI. *Id.* Dr. Casper represented that AAHI's goal was to support the
 4 underserved in Africa. *Id.* ¶ 3. In a June 2, 2021 e-mail to Dr. Soon-Shiong, Dr. Casper wrote, "I
 5 am thrilled at the opportunity for all of us to work together to advance the manufacturing of next-
 6 generation vaccine technologies in South Africa." *Id.* Ex. 1.

7 Consistent with these discussions, the Foundation signed a Memorandum of Understanding
 8 with AAHI on May 14, 2021, which was amended on January 7, 2022 (the "Amended
 9 MOU"). *See* Dkt. 1 ("Compl."), Ex. 2 (MOU). The Amended MOU recites that, to enable AAHI
 10 to exit receivership, the Foundation will give AAHI \$26 million over three years. *Id.* The
 11 funds were to enable AAHI to focus on "pandemic preparedness and rapid response, including a
 12 public benefit organization in South Africa." Compl. Ex. 2 at 1. The Amended MOU also reflects
 13 IDRI's name change to AAHI, a shorter version of the initially contemplated Africa's Access to
 14 Advanced Health Institute. Soon-Shiong Decl. ¶ 7. The Amended MOU is "legally binding" and
 15 "supersedes all previous written agreements, proposals and drafts, and oral agreements and
 16 discussions concerning its subject matter." Compl. Ex. 2 § 15.

17 The same day the Amended MOU was signed, the parties entered into a Grant Agreement
 18 ("Grant Agreement") for the provision of Foundation funds to AAHI.¹ Compl. Ex. 1. Consistent
 19 with the Amended MOU, the Grant Agreement says its "purpose" is, among other things, to allow
 20 AAHI to "retain[] and/or hir[e] and train[] senior scientists and scientific staff from both the United
 21 States and low- and middle-income countries in the areas of immunology, virology, oncology,
 22 adjuvant and vaccine product and process development[.]" *Id.* § 2.1. The Grant Agreement
 23 provides the Foundation the ability to withhold funds under certain circumstances, references the
 24 Amended MOU, and contains an integration clause. *Id.* §§ 3.1(c), 7, 8.9.

25 Just after these agreements were signed, Dr. Casper and Dr. Soon-Shiong travelled to meet
 26

27 ¹ AAHI also signed agreements with ImmunityBio, Inc., a public company of which Dr.
 28 Soon-Shiong is Executive Chairman. Dr. Soon-Shiong has recused himself from any AAHI
 Board decisions regarding ImmunityBio. *See* Decaire Decl. ¶ 75.

1 with leadership of the South African Universities of Cape Town, Wits, and Stellenbosch. Soon-
 2 Shiong Decl. ¶ 8. At these meetings, Dr. Casper re-affirmed that, after AAHI's exit from
 3 receivership, it would help provide advanced vaccine and educational human capital for the
 4 African continent. *Id.* These commitments were important to the Foundation. *Id.* ¶ 9.

5 **C. AAHI Board Composition**

6 The Amended MOU states that AAHI's Board shall consist of seven directors: Dr. Soon-
 7 Shiong, Dr. Casper, and five independent directors mutually agreed upon by both Dr. Soon-Shiong
 8 and Dr. Casper. Compl. Ex. 2, § 4. Under the Bylaws, the number may be increased only through
 9 a board vote; directors serve one-year terms; and, at the annual Board meeting, the directors for
 10 the following year are to be elected by Board vote. *Id.* Ex. 3 § 3.1. The Board has consisted of
 11 seven directors for over two years. On July 29, 2024, one director (David Kerr) indicated a desire
 12 to resign from the Board, but his resignation has not yet been accepted. *See* Decaire Decl. Ex. 40.

13 **D. AAHI's Board Vote to Fund Projects in Africa**

14 Consistent with the Amended MOU and Grant Agreement, the Board took steps to fund
 15 initiatives in Africa. On December 8, 2023, for example, the Board adopted a resolution that,
 16 among other things, directed management to establish a formal collaboration with the South
 17 African Medical Research Council "to advance diagnostics, medical interventions and develop
 18 human capacity across the research, care, and manufacturing spectrum." Decaire Decl. Ex. 8.

19 At a February 27, 2024 board meeting, the Board considered an application from the Wits
 20 Donald Gordon Medical Centre to fund training of doctors in South Africa. *See id.* Exs. 11, 12,
 21 15. The Board adopted a resolution agreeing to give \$3 million per year for three years to support
 22 the organization. *See id.* Ex. 17. Five of seven Board members voted in favor. Decaire Decl.
 23 ¶ 35. Specifically, Dr. Soon-Shiong, Dr. Gray, Dr. Kerr, Dr. Concepcion, and Mr. Hsu voted for
 24 the resolution; Dr. Casper and Dr. Mocarski objected. *Id.* Ms. Decaire was present and asked the
 25 directors to consider whether they were conflicted; all determined that there was no conflict and
 26 that they could vote. *Id.*; Soon-Shiong Decl. ¶ 15.

27 To effectuate the Board's February 27 resolution regarding sending funds to South Africa,
 28 at a June 3, 2024 board meeting, the Board adopted a resolution forming a sub-committee to

1 manage the funds to be transferred. *See* Decaire Decl. Ex. 22. The sub-committee was to be
 2 comprised of five board members, including Dr. Casper, and one African delegate. *See id.* The
 3 African delegate was Mr. Robert Appelbaum with the South African law firm Weber Wentzel.
 4 *See id.* Exs. 19, 20, 26. Because the draft meeting minutes Ms. Decaire circulated did not
 5 accurately reflect the Board’s resolution, they have not been finalized or approved. *See id.* Ex. 22.

6 Management claims that after the June 3 resolution was adopted and Dr. Soon-Shiong left,
 7 the “board members who remained at the meeting unanimously approved extending invitations to
 8 join the board to four new candidates who had been recommended by the Governance Committee
 9 and discussed in past board meetings and correspondence.” Compl. ¶ 48; *see also* Decaire Decl.
 10 Ex. 36. Critically, this vote of a Board subset did not expand the number of directors. Compl. Ex.
 11 3 § 3.1; Gray Decl. ¶ 5; Hsu Decl. ¶ 3; Concepcion Decl. ¶ 4; Kerr Decl. ¶ 5. Rather, the vote was
 12 to extend invitations and consider candidates the Governance Committee proposed and to have
 13 Board members interview them before a future meeting to vote on their potential election; at the
 14 time, most Board members other than Dr. Mocarski had not even met them. Gray Decl. ¶¶ 2, 4;
 15 Hsu Decl. ¶ 2; Concepcion Decl. ¶ 2; Kerr ¶ 3. At no time was Dr. Soon-Shiong asked to approve
 16 the new candidates as the Amended MOU required. Soon-Shiong Decl. ¶ 19.

17 As discussed below, Dr. Casper is now attempting to use what happened in June to
 18 effectuate the packing of the Board with members loyal to him and to Dr. Mocarski, and to undo
 19 the Board resolution in February regarding South Africa funding.

20 **E. Management’s Attempt to Install Unelected Board Members and Refusal to** 21 **Accept Board Resolutions**

22 Even though the Board had never voted to expand the number of directors, Dr. Casper,
 23 ostensibly on behalf of the Governance Committee, extended invitations to Dr. Julie Cherrington
 24 and Dr. Ann Kwong on June 7, 2024 to join the Board. *See* Decaire Decl. Ex. 39. The Board did
 25 not approve these invitations, one of which was to an individual, Dr. Cherrington, affiliated with
 26 Dr. Mocarski; the two have co-authored four papers together, and Dr. Cherrington is listed as a
 27 Dr. Mocarski “trainee” on his CV. Cobb Decl. Exs. 1-5. Both candidates accepted.

28 Dr. Casper immediately sought to convene a July Board meeting to discuss the budget –

1 and to undo the earlier resolution regarding sending funds to South Africa with a supposedly newly
 2 expanded Board. *See* Compl. ¶ 60. Dr. Soon-Shiong expressed surprise, writing, “I am unaware
 3 of any new board members joining ???” Decaire Decl. Ex. 24. Dr. Soon-Shiong sought “an urgent
 4 board meeting to understand the current state of affairs” and to have Mr. Appelbaum
 5 present regarding the transfer of funds to South Africa that had been approved months earlier. *Id.*

6 **F. AAHI Board Resolution to Investigate Management’s Conduct**

7 At an August 13, 2024 Board meeting called by Dr. Soon-Shiong, a quorum was present.
 8 Although, as Ms. Decaire noted, Dr. Soon-Shiong had noticed the meeting on August 8, 2024, less
 9 than the 10 days’ notice required by the Bylaws, Soon-Shiong Decl. ¶ 21, a majority of the
 10 directors waived notice as the Bylaws permit. *See id.*; Compl. Ex. 3 § 3.13. At the meeting, the
 11 Board determined “no new board members have been duly appointed in accordance with the
 12 Bylaws.” Decaire Decl. Ex. 40. The Board also resolved to appoint independent legal counsel to
 13 investigate certain actions by Management (including Dr. Casper and Ms. Decaire), including
 14 Management’s refusal to follow clear Board directives. *Id.*

15 **G. Management’s Covert and Unauthorized Retention of Susman Godfrey**

16 We now know that before the August 13, 2024 meeting, Ms. Decaire and Dr. Casper had
 17 covertly retained the Susman Godfrey law firm to carry out Management’s agenda through
 18 litigation and to commit AAHI funds to pay those lawyers. The day after the Board resolved to
 19 appoint independent counsel to investigate Management, August 14, 2024, Susman Godfrey LLP
 20 filed the instant action, purportedly on behalf of AAHI, alleging various supposed misdeeds by
 21 Dr. Soon-Shiong and seeking, among other things, his removal as a board member. *See* Compl.,
 22 Prayer for Relief. This suit was never authorized by the Board, and actually was contrary to Board
 23 instructions. *See* Soon-Shiong Decl. ¶ 23; Gray Decl. ¶¶ 8, 9; Hsu Decl. ¶¶ 5, 6; Concepcion Decl.
 24 ¶¶ 6, 7. The Board has also never been asked to vote on a resolution to remove Dr. Soon-Shiong
 25 as a director or even considered such action. *See* Soon-Shiong Decl. ¶ 23.

26 Recent communications reveal that Management retained Susman Godfrey largely on
 27 contingency – a costly proposition for AAHI that the Board never approved. *See id.* Ex. 10. And
 28 Ms. Decaire refused even to provide Susman Godfrey’s contract to AAHI’s Finance Committee

Chair, Mr. Edward Hsu, claiming “privilege.” Hsu Decl. ¶ 7 & Ex. 1.

III. LEGAL STANDARD

A temporary restraining order is “an extraordinary and drastic remedy.” *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012); *see also Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Apart from the need for a true emergency, the standard for issuing a temporary restraining order is “substantially identical” to the standard for a preliminary injunction. *See Stuhlberg Int’l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). The plaintiff must establish (1) “[it] is likely to succeed on the merits”; (2) “[it] is likely to suffer irreparable harm in the absence of preliminary relief”; (3) “the balance of equities tips in [its] favor”; and (4) “an injunction is in the public interest.” *Winter*, 555 U.S. at 20. Where there are “serious questions going to the merits,” a preliminary injunction may issue only “if the ‘balance of hardships tips sharply in the plaintiff’s favor,’ and the other two *Winter* factors are satisfied.” *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013) (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)).

IV. MANAGEMENT’S REQUEST FOR A TRO SHOULD BE DENIED

A. AAHI Is Not Likely to Prevail on the Merits

1. Management and Its Counsel Do Not Have Authority to Pursue Their Agenda in the Name of AAHI

A threshold reason to deny a TRO – and indeed any relief at all in this action – is that the lawyers who filed it had and have no authority to advance Management’s agenda in AAHI’s name. Washington Revised Code (“WRC”) Section 24.03A.490 provides that officers and individual directors of a non-profit have only authority given to them by a Board. AAHI’s Bylaws similarly provide that AAHI officers have only powers granted by the Board. Compl. Ex. 3 ¶ 4.5.

As Management appears to concede, the three individuals who initiated this action did not even attempt to obtain a Board approval to bring this lawsuit in AAHI’s name. *See* Compl. ¶ 21. And Management has refused to provide independent Board members with Susman’s retention agreement (asserting “privilege”), confirming that Susman does not represent AAHI at all. Hsu Decl. ¶ 7 & Ex. 1. When asked to explain on what authority it purported to bring claims, the

1 Susman Godfrey firm pointed to two documents, including Ms. Decaire's employment agreement,
 2 that authorize actions only in the normal course of AAHI business. Bringing a lawsuit to advance
 3 one faction's agenda, and to assist a minority in taking over the Board, while asserting "privilege"
 4 as against AAHI's independent Board members, all at great expense to be paid by AAHI's grant
 5 money, is anything but ordinary.

6 Citing WRC Section 24.03A.966, the Complaint asserts that Management-retained counsel
 7 can pursue claims in AAHI's name because the Nonprofit Corporation Act allows individual
 8 corporate directors, or their delegates, to pursue a petition regarding the validity of contested
 9 corporate actions. But that in no way allows a minority group (three individuals, two of whom are
 10 directors) to claim authority to act for the entity. What that statute actually says is as follows:

11 Except as provided in subsection (3) of this section, upon petition of a
 12 person whose status as, or whose rights or duties as, a member, delegate,
 13 director, or officer of a corporation are or may be affected by any corporate
 action, or, in the case of a charitable corporation, the attorney general, the
 court may hear and determine the validity of the corporate action.

14 Management's covertly appointed counsel does not have authority to pursue claims for
 15 AAHI. There was never a Board vote or resolution consenting to the Susman firm's retention, or
 16 permitting Susman to bring a lawsuit on AAHI's behalf. Section 24.03A.966 permits actions only
 17 by an individual "person whose status as, or whose rights or duties as, a member, delegate, director,
 18 or officer of a corporation are or may be affected by any corporate action." It does not authorize
 19 Management to bring an action on behalf of the company. Management cannot point to any Board
 20 vote or other proper authorization allowing Susman to advance this minority group's agenda.

21 **2. Dr. Soon-Shiong Did Not Breach Any Fiduciary Duties**

22 Management is also not likely to prevail on its theory that Dr. Soon-Shiong breached duties
 23 to AAHI.² Under the Washington Nonprofit Corporation Act, and consistent with court holdings
 24 in other jurisdictions, a charitable corporation is not barred from engaging in transactions in which
 25 its directors, such as Dr. Soon-Shiong, have an interest, as long as such transactions are intrinsically

26 ² Management devotes a significant portion of their brief urging this Court to rule on an
 27 issue of first impression: Whether directors of non-profit charitable organizations owe fiduciary
 28 duties under Washington law. TRO at 14-16. Because Dr. Soon-Shiong did not breach any
 duties, and there is no emergency or authority to bring these claims, the Court need not reach this
 issue.

1 fair or are approved by independent directors. *See* WRC § 24.03A.615; *Oberly v. Kirby*, 592 A.2d
2 445, 472-73 (Del. 1991). These standards will be satisfied here.

3 ***First***, Dr. Soon-Shiong’s participation in decision-making with respect to use of AAHI
4 funds has been intrinsically fair. AAHI agreed to appoint Dr. Soon-Shiong as Board Chairman,
5 knowing his affiliation with AAHI’s major donor, the Chan Soon-Shiong Foundation. What
6 Management now proposes is inappropriate and overbroad—that Chairman Dr. Soon-Shiong
7 recuse himself from all decisions on how AAHI uses funds to comply with the Foundation’s
8 obligations under the Grant Agreement. Dr. Soon-Shiong already recuses himself from issues
9 regarding disputes with the Foundation or ImmunityBio. Soon-Shiong Decl. ¶ 15. There is no
10 reason to exclude him from business discussions regarding AAHI’s use of funds generally.

11 ***Second***, the Board actions Management complains of, specifically the resolution to fund
12 initiatives in South Africa, would have passed with a majority of voting directors, with or without
13 Dr. Soon-Shiong. The resolution passed by a vote of five to two (assuming Dr. Casper’s objection
14 counted). Four to two would still be a majority under the Bylaws. Compl. Ex. 3 § 3.7.

15 By Management’s own admission, AAHI sought to work with Dr. Soon-Shiong to identify
16 projects in South Africa. Dr. Soon-Shiong made no unilateral decisions; rather, the Board
17 considered the application from the Wits Donald Gordon Medical Centre to fund training of
18 doctors in South Africa and formally adopted the resolution, consistent with the Bylaws.

19 Management also incorrectly asserts that Dr. Soon-Shiong’s refusal to recognize the two
20 improper new directors breached fiduciary duties. TRO at 17. In standing on Bylaw requirements
21 to protect the company from improperly installed board members, Dr. Soon-Shiong is obviously
22 acting in good faith and in AAHI’s interests.

23 **3. The Bylaws, Amended MOU, Grant Agreement, and Governance**
24 **Committee Charter All Prohibit and Defeat the Extraordinary Relief**
25 **Being Sought**

26 Management is also unlikely to succeed on its claims because the relief sought – such as a
27 court order expanding the number of directors beyond seven, or declaring “new” directors validly
28 appointed – is contrary to AAHI’s Bylaws. The number of Board seats cannot be increased beyond

seven without a Board vote or unanimous written consent, Compl. Ex. 3 §§ 3.1(a), 3.8, neither of which occurred here. Otherwise, the Board can fill vacancies only as they arise. *Id.* § 3.2. The Amended MOU further provides that Dr. Soon-Shiong has a right to approve all new Board members; that never occurred. Compl. Ex. 2 § 4. Indeed, most current Board members have not even met the two “new” members Management is insisting are on the Board. Gray Decl. ¶ 7; Hsu Decl. ¶ 4; Concepcion Decl. ¶ 5; Kerr Decl. ¶ 7. And the Governance Committee Charter limits that committee’s ability to fill Board vacancies. Soon-Shiong Decl. ¶ 19 & Ex. 8.

Management also seeks to invalidate Board resolutions regarding use of funds for certain initiatives in Africa. But the Amended MOU conditions Foundation obligations on AAHI’s pursuit of projects in Africa, Compl. Ex. 2 § 10, as is consistent with the stated purpose of the Grant Agreement. *Id.* Ex. 1 § 2.1. Management argues the Grant Agreement’s integration clause supersedes “prior” agreements, TRO at 6, but the Amended MOU is not a “prior” agreement and also contains an integration clause, Compl. Ex. 2 § 15, and the Grant Agreement references the Amended MOU. *Id.* Ex. 1 § 3.1(c). At a minimum, there are significant factual disputes that defeat Management’s application. *See Sherman v. Lunsford*, 44 Wash. App. 858, 862 n.3 (1986) (“Whether a contract is integrated is a question of fact [and a] boilerplate integration clause will be disregarded where it is in fact false as demonstrated by parol evidence.”).!

4. The Corporate Governance Issues Here Are Not Proper Subjects of TRO Relief

To resolve Management’s claims, to the extent they are even justiciable, the Court will be required to make determinations about which directors do or should serve on AAHI’s board; which directors should be removed or recused and from which matters; which past or current Board actions are valid; and related issues. *See* Compl., Prayer for Relief. Many of these complex corporate governance issues are fact-intensive and wholly inappropriate for resolution on a TRO. *See, e.g., Stroud v. Grace*, 606 A.2d 75, 79 (Del. 1992) (“Delaware courts should exercise caution when invalidating corporate acts based upon hypothetical injuries and without giving due deference to established principles of Delaware law regarding corporate governance.”).

Management cites no precedent in which a court in this district (or any other) has granted relief such as what they seek on a TRO. And similar requests have been summarily denied. For

1 example, in *CBS Corp. v. Nat'l Amusements, Inc.*, 2018 WL 2263385 (Del. Ch. May 17, 2018),
 2 the defendant that controlled approximately 80% of CBS's voting power pushed for a merger
 3 between CBS and Viacom. *Id.* at *1. The plaintiffs, a Board Special Committee formed to
 4 consider the merger, determined the merger was not in the company's best interests, and sought a
 5 TRO, asserting the controlling shareholder may "immediately replace members of the Board and
 6 use the new directors to force through the merger . . . and make other changes to the CBS
 7 organizational documents" to impede the Board. *Id.* at *1-2.

8 Like Management here, the Special Committee requested extraordinary relief: that the
 9 controlling shareholder be restrained from interfering with the composition of CBS's Board,
 10 modifying CBS's governance documents, or acting to interfere with decisions at a special Board
 11 meeting. *Id.* The Delaware Chancery Court denied plaintiffs' TRO request. *Id.* at *6. The court
 12 emphasized that "[n]o precedent has been identified . . . in which the court has ever entertained,
 13 much less sanctioned, the type of request for relief that plaintiffs ma[d]e here. In and of itself, this
 14 suggest[ed] that a truly extraordinary set of circumstances would be necessary to grant such a
 15 request." *Id.* This Court should similarly deny Management's TRO relief and attempted coup.

16 **B. There Is No True Emergency, as Neither AAHI Nor Management Will Suffer**
 17 **Irreparable Harm Absent a TRO**

18 Management's claims of irreparable harm are unpersuasive. First, and most tellingly,
 19 Management claims AAHI will suffer irreparable harm unless the independent investigation *into*
 20 *Management's own conduct* is restrained. Management has it backwards – the Board determined
 21 an investigation was warranted and authorized it at a proper meeting. It would harm AAHI and
 22 be a perverse result for Management to be able to impede investigation of Management's own
 23 conduct, by claiming irreparable harm should their misdeeds be exposed.

24 Management next claims they need emergency relief to prevent Dr. Soon-Shiong from
 25 being involved with company decisions "in any way pertaining to the Chan Soon-Shiong
 26 Foundation." This is impermissibly overbroad. For example, AAHI's use of the Foundation's
 27 grant funds, and the commitment to send a portion of those funds to South Africa, are principal
 28 components of AAHI's business – shutting Dr. Soon-Shiong out of such matters effectively would

mean that, even though he is Chairman, he would have no say as Chairman and director in major decisions of the company. Dr. Soon-Shiong has consistently recused himself when true conflicts arise; that has been the status quo for the over two years he has been Board Chairman, and he has had a say in how AAHI uses funds received from the Foundation. Management's delay in seeking to change the status quo, alone, is grounds to find no irreparable harm. *See Miller v. Norris*, 2019 WL 5592856, at *3 (W.D. Wash. Oct. 30, 2019) (ten-month delay in seeking TRO undermined irreparable harm claim); *Lydo Enters. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984) ("A delay in seeking a preliminary injunction is a factor to be considered in weighing the propriety of relief."); *Dahl v. Swift Distrib., Inc.*, 2010 WL 1458957, at *4 (C.D. Cal. Apr. 1, 2010) (eighteen-day delay in filing TRO application "implie[d] a lack of urgency and irreparable harm").

Management also asserts that AAHI will suffer irreparable harm absent the appointment of "new" directors Dr. Kwong and Dr. Cherrington on an emergency basis because the Bylaws require seven directors³, and only six currently serve after Dr. Kerr indicated an intent (not yet accepted) to resign. First, it is not correct that only six directors currently serve. At the August 13, 2024 Board meeting, the Board "determined not to accept David Kerr's resignation until members have an opportunity to discuss with him whether he would reconsider and continue to serve on the Board." Decaire Decl. Ex. 40. And should Dr. Kerr cease to be a director, the Bylaws specify the remedy: "any vacancy in the Board, including a vacancy arising from an increase in the number of directors, may be filled by Board Vote." Compl. Ex. 3 § 3.2.

Management similarly claims, incorrectly, that appointment of two "new" directors is necessary to ensure a sufficient number of "independent" directors (five) as the Bylaws and Amended MOU require. Again, the remedy for any such shortfall is a Board meeting and vote, not a federal complaint and TRO advancing Management's inappropriate selections.

Finally, citing no authority in support, Management asserts AAHI will suffer irreparable harm absent the appointment of a corporate monitor to "facilitate the appointment of additional independent directors." TRO at 3. As noted, what Management really wants is court intervention

³ There is no basis for Management's insistence that there now be eight directors, including two who they are attempting to install without complying with the Bylaws.

1 to bypass the Bylaws and stack the Board with members aligned with them. This is not appropriate
 2 emergency relief. AAHI has Bylaws that must be followed. That Management does not like these
 3 procedures does not create an emergency or irreparable harm.

4 **C. The Balance of Hardships Weighs Against a TRO**

5 The balance of hardships also weighs decisively against Management’s requested relief.
 6 Management asserts that Dr. Soon-Shiong and the Foundation will not suffer *any* harm from its
 7 sweeping TRO request, whereas AAHI will be harmed without what they seek. In reality, Dr.
 8 Soon-Shiong and the Foundation will of course suffer harm should the TRO issue. Dr. Soon-
 9 Shiong would be prohibited from involvement in major Board decisions, including the use of funds
 10 his Foundation has donated. The evidence is that a new Management-picked Board would spend
 11 the Foundation’s grant money in contravention of the Grant Agreement, Amended MOU, and
 12 Board instructions (including by spending it on this litigation).

13 **D. The Balance of Hardships Also Weighs Against Management Because the**
 14 **Emergency Relief Being Sought Is Impermissibly Overbroad and Imprecise**

15 The relief Management seeks is overbroad and contrary to the “limited purpose” for which
 16 TROs and injunctions may be employed – maintaining the status quo. *Zepeda v. United States*
 17 *I.N.S.*, 753 F.2d 719, 729 n.1 (9th Cir. 1983); *King v. Saddleback Junior College District*, 425 F.2d
 18 426, 427 (9th Cir. 1970).

19 The seven remedies Management seeks would disrupt the status quo and are not narrowly
 20 tailored to any specific harm. For example, Management essentially (and impermissibly) asks this
 21 Court to enjoin Dr. Soon-Shiong from participating in business decisions “pertaining to” the
 22 Foundation, whatever that means. Such vague requests are contrary to well-settled Ninth Circuit
 23 law. *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th Cir. 1990) (“[A]n injunction must
 24 be narrowly tailored to give only the relief to which plaintiffs are entitled.”); *Stormans, Inc. v.*
 25 *Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009) (“The district court abuses its discretion in issuing
 26 an overbroad injunction.”).

27 Further, as discussed below, Management’s requested relief disturbs the status quo and
 28 runs afoul of AAHI’s Bylaws (expanding the Board without a vote), and purports to require

1 invalidation of corporate acts taken in accordance with the Bylaws.

2 **E. Public Interest Factors Do Not Favor, and Actually Disfavor, a TRO**

3 Management claims the public interest favors a TRO by preserving the status quo while
 4 the Attorney General weighs whether to intervene. But the requested TRO would not preserve the
 5 status quo; it would upend it. The TRO would transform AAHI by expanding the Board beyond
 6 the seven directors permitted in the Bylaws, without a proper vote. It would nullify Board
 7 resolutions about how AAHI should spend its money. It would require overbroad recusal of a
 8 duly-elected Board member. In short, Management’s version of the “status quo” does not match
 9 reality and requires the denial of the TRO. *See Townsend v. Bureau of Land Mgmt.*, 2012 WL
 10 2792087, at *1 (W.D. Wash. July 9, 2012) (denying TRO and noting that “the basic function of
 11 such injunctive relief is to preserve the *status quo* pending a determination of the action on the
 12 merits”); *Bullock v. Carney*, 463 F. Supp. 3d 519, 524 (D. Del. 2020) (denying TRO where
 13 “counsel’s proposed definition of status quo is not the existing state of affairs but instead the state
 14 of affairs he believes [plaintiff] is entitled to . . . and which he hopes to achieve with this lawsuit”).

15 **F. If Any Emergency Relief Is Granted, the Court Should Require Management**
 16 **to Post a Substantial Bond**

17 Management asserts that no bond should be required. But as discussed above, the
 18 requested relief could cause great harm to AAHI and upset the status quo: it would nullify a Board
 19 resolution sending \$9 million (\$3 million per year for three years) to South Africa for critical
 20 healthcare needs, require overbroad recusal of the Board Chairman, and stack the Board with
 21 members improperly chosen to advance Management’s goal of diverting Foundation funds to other
 22 purposes. At a minimum, the Court should set a \$3 million bond to address harm from
 23 Management spending this year’s South Africa funds on other activities before a resolution on the
 24 merits is reached. Further, because this action was filed in AAHI’s name without proper authority,
 25 Defendants request that Management (not AAHI) be required to post the bond.

26 **V. CONCLUSION**

27 For the foregoing reasons, Management’s effort to obtain a TRO should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2024, a true and correct copy of the foregoing was filed electronically by CM/ECF, which caused notice to be sent to all counsel of record.

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